No. 91-113

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

A/S DAMPSKIBSSELSKABET TORM,

Petitioner,

—against—

BEAUMONT OIL LTD. and
BANQUE PARIBAS (SUISSE) S.A., GENEVA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether this Court should review the unanimous holding of the Court of Appeals in an admiralty case that, in accordance with precedent of this Court and consistent with all other Circuit authority, a consignee is not liable for a carrier's freight charges where the consignee did not accept delivery of the cargo and did not, expressly or impliedly, agree to pay such freight charges.

COUNTER-STATEMENT OF STATUTES INVOLVED

No statute is directly involved in this matter.

The petition erroneously states that a generic version of U.C.C. § 9-504 (1981) (which concerns the right of a secured party to dispose of collateral) is involved. Inasmuch as there has been no foreclosure or disposition of collateral by a secured party in this case, U.C.C. § 9-504 was not at issue in either the Court of Appeals or the district court, and is not at issue here.

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STATEMENT OF THE CASE

This case is an attempt by petitioner A/S Dampskibsselskabet Torm ("Torm") to recover from respondent Banque Paribas (Suisse) S.A. ("Bank")[1] freight and related transportation charges owed to Torm by Beaumont Oil Ltd. and Beaumont Oil, Inc. (collectively, "Beaumont") in connection

1 Until 1987 a majority of the outstanding shares of the Bank was indirectly owned by the Government of France through its holding company, Compagnie Financière de Paribas ("CFP"). At present, more than 99% of the shares are indirectly owned by CFP, which is now publicly held, and less than 1% are owned by the public. This statement is made pursuant to Rule 29.1 of the Rules of this Court.

with Beaumont's utilization of Torm's shipping services. The Bank did not agree to pay the freight charges; it did not purchase the cargo at issue; it did not enter into the charter party for the transportation of the cargo; and it did not accept or receive the cargo. Rather, the Bank simply financed Beaumont's purchase of the cargo and, when Beaumont—which did agree to pay the freight charges—became financially unable to do so, Torm sought to impose such liability on the Bank. The Court of Appeals properly held that the Bank has no liability to Torm, and this case raises no issues that warrant review by this Court.

In May 1986, Beaumont purchased approximately 240,000 barrels of unleaded gasoline (the "Cargo") from a supplier in Venezuela ("Corpoven"). Pet. App. 4a. To finance the purchase, Beaumont borrowed approximately $5.2 million from the Bank in the form of a letter of credit issued on May 23, 1986 for the account of Beaumont in favor of Corpoven. *Id.* Because Beaumont frequently financed its purchases of petroleum cargoes by obtaining credit from the Bank, the Bank held valid security interests in all of Beaumont's assets. Pet. App. 24a. In addition, Beaumont granted the Bank a specific security interest in the Cargo and its proceeds as further collateral for the Bank's $5.2 million loan to Beaumont. Pet. App. 4a.

At this same time, Beaumont entered into a tanker voyage contract with Torm (the "Charter Party"), pursuant to which Torm agreed to transport the Cargo for Beaumont from Venezuela to the United States. Pet. App. 4a. The Charter Party obligated *Beaumont*, not the Bank, to pay all freight and related transportation charges, and the Bank was not a party to the Charter Party. *Id.*

After the Cargo was fully loaded aboard Torm's ship, the TORM ROTNA, Torm, pursuant to Beaumont's instructions, issued three bills of lading to "the order of Banque Paribas (Suisse) S.A. Geneva, notify Beaumont Oil, Inc. Houston." Pet. App. 4a. Beaumont's instructions were consistent with the customary practice in international shipments to name the

lender as consignee in the bill of lading in order to perfect and protect the lender's security interest in a cargo. Pet. App. 16a. The bills of lading "stood mute as to who was to pay the freight" charges, although, as noted, the Charter Party "clearly obligated Beaumont" to pay Torm's charges. Pet. App. 9a.

The TORM ROTNA left Venezuela at the end of May 1986 and headed for New York Harbor. Pet. App. 5a. Subsequently, Corpoven presented the bills of lading, along with other required documents, to the Bank, and the Bank paid $5.2 million to Corpoven on behalf of Beaumont and charged this loan to Beaumont's account. Pet. App. 6a.

While the voyage was underway, Beaumont exercised its right to redirect the ship and instructed Torm to route the TORM ROTNA from New York to Portland, Oregon. Pet. App. 5a. As the ship approached Portland, Beaumont hired Time Oil Co. ("Time") in Portland to store the Cargo upon its discharge there. In Beaumont's contract with Time—to which the Bank was not a party—Beaumont warranted to Time that *Beaumont* was the "sole legal and beneficial owner" of the Cargo and that the Bank held a lien on the Cargo. Pet. App. 5a.

The Cargo arrived in Portland, Oregon in June 1986. Pet. App. 5a.[2] Notwithstanding that Torm had not received payment from Beaumont or taken any steps to ensure that it

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2 When the Cargo arrived at Portland, Beaumont did not possess the bills of lading, which were required to permit off-loading of the Cargo. It routinely happens that cargoes arrive in port before the bills of lading do, and Torm and Beaumont had planned for such an occurrence. The Charter Party specified that Torm would discharge the Cargo without presentation of bills of lading upon Beaumont's issuance of a "letter of indemnity" which indemnified Torm solely from liability for discharging cargo without receipt of the bills of lading. The letter of indemnity did not deal with issues concerning the payment of freight, and, by its own terms, expired when Beaumont presented the bills of lading to Torm (Pet. App. 6a), which occurred in July 1986. Pet. App. 54a.

would receive such payment, Torm discharged the Cargo into Time's storage tanks (Pet. App. 6a), and thereby voluntarily and irrevocably waived Torm's universally-recognized possessory lien on the Cargo. Torm's waiver was not induced in any way by the Bank.

When the Cargo was fully unloaded and transferred into Time's storage facilities, Time issued a non-negotiable warehouse receipt in the name of the Bank in conformity with state law. Pet. App. 18a. Beaumont then proceeded, as owner of the Cargo, to sell the Cargo. Pet. App. 6a. Because the Cargo was subject to the security interest of the Bank, the receipts of Beaumont's sales of the Cargo were applied to reduce Beaumont's indebtedness to the Bank. *Id.*

By July 1986, Beaumont had not paid any of the freight charges it owed Torm, so Torm commenced the present action seeking to recover such charges. Pet. App. 6a. Although Beaumont had expressly obligated itself (in its Charter Party with Torm) to pay Torm's transportation charges for shipping Beaumont's Cargo, and Torm agreed to look to Beaumont for payment of Torm's freight charges, Beaumont never appeared in the action and "Torm has directed its efforts to recovering from the [B]ank." Pet. App. 7a.

The United States District Court for the Southern District of New York (where this action was transferred following Torm's bringing suit in the United States District Court for the District of Oregon) found that (i) the Bank "did not enter into an agreement by which it became obligated to pay for the shipping costs allocable to Beaumont Oil Ltd.'s oil aboard plaintiff's ship, the M/T TORM ROTNA" and (ii) the Bank did not "accept the oil." Pet. App. 24a. Both of these factual findings of the district court, which were the subject of Torm's cross-appeal to the Court of Appeals, were affirmed by the Court of Appeals. Pet. App. 9a and 11a.

The district court, however, found the Bank liable for Torm's freight charges based solely on an implied promise

arising out of a few actions by the Bank[3] that the district court found to be the Bank's exercise of "dominion and control" over the Cargo. Pet. App. 24a. The district court's decision was unprecedented in that it represented the first time a secured creditor which did not accept delivery of a cargo was held liable for shipping charges incurred by its debtor, the owner of the cargo.

On appeal, however, the United States Court of Appeals for the Second Circuit, after "carefully consider[ing] all of the factors relied upon by the district court" (Pet. App. 20a), unanimously reversed the district court's imposition of liability for freight charges based upon the actions of the Bank. The Court of Appeals held that "the [B]ank simply cannot be held liable for shipping charges under the circumstances of this case." *Id.*

In reaching this conclusion, the Court of Appeals acted in complete conformity with the prior decisions of this Court and with *States Marine Int'l, Inc.* v. *Seattle-First Nat'l Bank*, 524 F.2d 245 (9th Cir. 1975), the only prior Circuit Court decision ever to address whether a secured creditor which neither accepted a cargo nor agreed to pay for its transport could be held liable for freight charges incurred by its borrower.

Analyzing the issue before it, the Court of Appeals agreed with the Ninth Circuit that " '[e]ven where there is no actual acceptance of the goods, . . . presumptive ownership [and thus an implied obligation to pay freight charges] *may* arise from [a party's] exercise of dominion and control over the shipment.' " Pet. App. 11a (emphasis added) (quoting *States Marine*, 524 F.2d at 248). Thus, the Court of Appeals found

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3 These were: requiring that the Bank be named as consignee on the bill of lading; co-signing Torm's standard-language letter of indemnity that Beaumont issued to Torm which allowed the Cargo to be off-loaded to Beaumont; having a warehouse receipt issued in the name of the Bank; acknowledging sales of the Cargo and applying proceeds to reduce Beaumont's debt; approving the request of the warehouse to regrade the Cargo; and "benefiting" from Torm's services. Pet. App. 24a-26a.

that "[t]he critical inquiry in the instant case, as in *States Marine*, [was] whether the actions undisputedly taken by the [B]ank were sufficient to confer it with the status of a presumptive owner." Pet. App. 14a.

Recognizing the Ninth Circuit's holding that acts more indicative of a security interest than ownership do not give rise to liability for freight charges, the Court of Appeals painstakingly analyzed all the actions which the district court found the Bank to have taken. Pet. App. 15a-20a. Unable meaningfully to distinguish the actions of the Bank from the acts which the Ninth Circuit found could not provide a basis for liability in *States Marine*, the Court of Appeals concluded that the Bank was not liable for the freight charges owed to Torm. Pet. App. 22a. The court, therefore, reversed the judgment of the district court.

Torm's petition for rehearing and suggestion for rehearing in banc was thereafter denied by the Court of Appeals. Pet. App. 27a-28a.

ARGUMENT

As the foregoing statement demonstrates, Torm's petition for a writ of certiorari is based upon a false premise. The Court of Appeals did not create, as Torm contends, an exception to freight liability for secured creditors. *See* Pet. i. Had the court truly granted "immunity to secured parties," as Torm suggests (Pet. 6), then the court would not have needed to evaluate carefully, as it did, all of the Bank's actions to see whether liability should be imposed *on this particular secured creditor in this particular case*. The Court of Appeals, as did the Ninth Circuit in *States Marine*, simply held that a secured creditor which (i) is not statutorily liable for freight charges, (ii) does not accept or take delivery of the cargo, (iii) does not contract to pay the freight charges, and (iv) takes actions indicative of its security interest, rather than an ownership interest, in the cargo, may not be subjected to

liability for freight costs. That determination raises no issue warranting review by this Court.

Torm has raised three points in its attempt to have this Court review the unanimous decision of the Court of Appeals: (1) that the Court of Appeals created an exception for all secured parties to the rules relating to consignee liability for freight charges; (2) that the Court of Appeals' decision conflicts with authority of this Court and of the Ninth and Second Circuits; and (3) that the decision unfairly favors secured parties over carriers such as Torm. None of Torm's positions has any merit, and each should be rejected by this Court.

1. The Decision Below Does Not Create a "Secured Party Exception" to the Rules Relating to Consignee Liability for Freight Charges

It is Torm's position that any person who asks to be consignee on a bill of lading must always, under every circumstance, be liable for the payment of freight charges.[4] Torm even goes so far as to claim this to be an "absolute rule" (Pet. 19), and that knowingly being named consignee is "dispositive" of the freight liability issue. Pet. 7. From that posture, Torm contends that the court below, in ruling in favor of the Bank in this one instance, created a new rule of law that secured creditor/consignees can never be liable for freight charges. Pet. 6.

Torm's contentions are preposterous, and Torm fails to cite even *one* case to this Court that supports them. Rather, all of Torm's authorities support what both the court below and the district court correctly held (Pet. App. 8a-11a and 24a): that a consignee, whether a secured party or anyone else, is liable to pay freight charges only in certain limited, well-defined circumstances. Moreover, those authorities—and particularly the decision below—fully support the rule that

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4 Torm's petition continuously argues this theme. *See* Pet. 7, 8, 9, 10, 12, 13, 15, 17, 18, 19, 20.

secured creditor/consignees who are found to come within those circumstance will be liable for the payment of freight charges.

What Torm ignores in its petition is that a consignee's liability for freight charges is not automatic. Thus, it is a long-established rule that the shipper/consignor is primarily liable to the carrier for the freight charges,[5] and the consignee's liability arises "*only* when there is some binding obligation on the part of the consignee to pay freight charges." *States Marine*, 524 F.2d at 247 (emphasis added). *See, also, e.g., Louisville & N.R.R.* v. *Central Iron & Coal Co.*, 265 U.S. 59 (1924); *Pittsburgh, C.C. & St. L. Ry.* v. *Fink*, 250 U.S. 577 (1919); *Dare* v. *New York Cent. R.R.*, 20 F.2d 379 (2d Cir. 1927). Such a "binding obligation" can occur: (i) pursuant to a statutory obligation (*see, e.g.*, Section 10744 of the Interstate Commerce Act, 49 U.S.C. § 10744, which applies to interstate, but not international, shipments); (ii) pursuant to an express agreement by the consignee to pay the freight charges (*see, e.g., Louisville & N.R.R.*, 265 U.S. at 67); or (iii) pursuant to an obligation implied by the court arising from the conduct of the consignee in accepting delivery of a cargo or exercising "dominion and control" over a cargo (*see, e.g., Pittsburgh, C.C. & St. L. Ry.*, 250 U.S. at 581; *States Marine*, 524 F.2d at 248). However, merely being named as the consignee in a bill of lading does not, without more, make the consignee liable for freight charges. *E.g., States Marine*, 524 F.2d at 247.

The Court of Appeals applied these principles to the facts of this case, in a neutral, even-handed manner without singling out any class of potential consignees for unique treatment. The court simply determined that a consignee who holds bills of lading as security does not become the presumptive owner of a cargo, and therefore liable to pay freight charges, merely by "following commonplace and pru-

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5 *See, e.g., Louisville & N.R.R.* v. *Central Iron & Coal Co.*, 265 U.S. 59, 67 (1924); *O'Boyle Tank Lines, Inc.* v. *Beckham*, 616 F.2d 207, 209 (5th Cir. 1980); *States Marine Int'l, Inc.* v. *Seattle-First Nat'l Bank*, 524 F.2d 245 (9th Cir. 1975).

dent commercial banking practices" to perfect and monitor its security interest. Pet. App. 21a. It is clear, however, that the decision below will not prevent a future secured creditor/consignee who forecloses on a cargo, accepts its delivery, agrees to pay for its transport, or who takes any other action which renders the secured creditor the actual or presumptive owner of a cargo from being liable to the carrier for unpaid freight charges. The decision below is correct, and no purpose would be served by a review of that decision by this Court.

2. There Is No Conflict Between the Decision Below and Authority of This Court or the Circuits

Torm incorrectly contends that the decision below is in conflict with "principles enunciated" by this Court, and with one decision each by the Ninth and Second Circuits. Pet. 10 and 12. To the contrary, the decision below quoted from and applied the very standards relating to consignee liability that were articulated by this Court in *Louisville & N.R.R.* v. *Central Iron & Coal Co.*, 265 U.S. 59 (1924) and *Pittsburgh, C.C. & St. L. Ry.* v. *Fink*, 250 U.S. 577 (1919), by the Ninth Circuit in *States Marine*, and by the Second Circuit in *Dare* v. *New York Cent. R.R.*, 20 F.2d 379 (2d Cir. 1927). The Court of Appeals faithfully adhered to the reasoning and holdings of those authorities, and no inconsistencies exist between those authorities and the decision below.

Apparently unwilling to assert that the decision below represents an actual conflict with directly-relevant, consignee-liability decisions of this Court such as *Louisville & N.R.R.*, *supra*, and *Pittsburgh, C.C. & St. L. Ry.*, *supra*, Torm instead claims that the decision below "challenged principles enunciated by this Court" in *Dows* v. *National Exch. Bank*, 91 U.S. 618 (1875) and in *National Bank* v. *City Bank*, 103 U.S. 668 (1881) and is not in accord with "principles of contract interpretation" announced in *Calderon* v. *Atlas S.S. Co.*, 170 U.S. 272 (1898). Pet. 12 and 17. Torm's argument is, however, pure sophistry.

Both *Dows* and *National Bank* involved a grain dealer in New York State who, shortly after the Civil War, engaged in various fraudulent activities, including selling wheat it did not own. *Dows*, 91 U.S. at 637; *National Bank*, 103 U.S. at 672. In *Dows*, this Court decided that a bank in Wisconsin, which "claimed [the wheat] as its property" (91 U.S. at 618), was entitled to maintain a trover action to recover "the property of the [bank]." 91 U.S. at 624. In *National Bank*, the Court decided it was a jury question whether the defendant was negligent in storing wheat with the grain dealer. 103 U.S. at 671.

These decisions simply have nothing to do with whether a bank is required to pay freight charges incurred by another, and the decisions do not even purport to deal with that issue. The Bank here, unlike the bank in *Dows*, never claimed the Cargo as its property; the Bank recognized instead that Beaumont owned the Cargo and the Bank had a security interest in it. Nor is there any claimed procedural error in the conduct of this case. The decision below does no violence to the principles of *Dows* and *National Bank*.

Nor does the analysis of the Court of Appeals depart from "fundamental principles of contract interpretation," as Torm incorrectly contends. Pet. 17. As this Court explained in the very decision relied on by Torm: " 'There can be no construction where there is nothing to construe.' " *Calderon* v. *Atlas S.S. Co.*, 170 U.S. 272, 281 (1898) (quoting *United States* v. *Hartwell*, 73 U.S. 385, 396 (1867)). There is nothing about Torm's bill of lading in this case, or the fact that the Bank was named therein, that requires any construction in this case. *See Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 342 (1982) (a "bill of lading is the . . . contract between [a] shipper-consignor and the carrier"—*not* the consignee). In concluding that the Bank did not act as presumptive owner of the Cargo, the Court of Appeals clearly did not, as Torm contends (Pet. 18), ignore the "objective criteria in this case" but rather considered all objective criteria, including Beaumont's contemporaneous statement that it owned the Cargo. Pet. App. 5a.

Torm's contention that the decision below conflicts with *States Marine* is also purely imaginary. *States Marine* is, as noted by the court below (Pet. App. 22a) and Torm (Pet. 13), the leading decision in the area of consignee liability for freight charges. The facts underlying *States Marine* "closely paralleled those of the instant case" (Pet. App. 18a), and, as the Court of Appeals made clear in conducting an extensive analysis of *States Marine* and its applicability to this case, the two cases speak with one voice, without conflict. Pet. App. 11a-22a.

The principal factual distinction between *States Marine* and this case, and the one element Torm continually dwells on in its petition, is that the Bank in this case, unlike the bank in *States Marine*, asked to be named in the bills of lading. This one factor, however, is a distinction without a difference and "does not compellingly distinguish" the Bank's actions in this case from those of the bank in *States Marine*. Pet. App. 15a. First, as discussed above, a consignee does not become liable for freight charges merely because it is the consignee. Second, as the Second Circuit noted, the shipment involved in *States Marine* was from one U.S. state to another, and the bank in *States Marine* therefore needed only to make the appropriate filings required by the Uniform Commercial Code ("U.C.C.") to perfect its security interest. Pet. App. 15a. On the other hand, the shipment in this case originated in Venezuela and was not governed by the U.C.C. at the start of the voyage. It was, therefore, "not unreasonable or inconsistent with its role as a secured creditor for [the Bank] to be named on the bills of lading under these circumstances." Pet. App. 16a. Significantly, Torm's petition does not even attempt to respond to the Court of Appeals' explanation for the insignificance given to the Bank's request to be named in the bills of lading.

Finally, the purported conflict within the Second Circuit Torm claims to have identified is merely a product of Torm's own confusion. In *Dare* v. *New York Cent. R.R.*, 20 F.2d 379 (2d Cir. 1927), the Second Circuit imposed liability for freight charges upon a secured creditor who had *taken deliv-*

ery of a cargo. The Second Circuit determined in that case that the defendant's status as a secured creditor was "immaterial" to the defendant's "obligation to pay freight *upon delivery of the goods* to him." *Id.* at 380 (emphasis added).

Torm's error regarding *Dare* is a result of Torm's (i) refusal to accept the factual finding of the district court, affirmed by the Court of Appeals, that the Bank did *not* accept delivery of the Cargo in this case and (ii) a misunderstanding of the facts of *Dare*. Torm claims "[t]he essential fact [in *Dare*] was that the secured party was named as the consignee." Pet. 20. That is not true. The secured party was *not* named as the consignee on the *Dare* bills of lading; rather, the secured party obtained the bills of lading pursuant to a pledge *by* the consignee. *Dare*, 20 F.2d at 380.

Dare is nothing more than an application of the long-standing principle, announced by this Court 12 years before *Dare* and fully recognized by the court below (Pet. App. 10a), that "the consignee is *prima facie* liable for the payment of the freight charges when he *accepts* the goods from the carrier." *Pittsburgh C.C. & St. L. Ry.* v. *Fink*, 250 U.S. 577, 581 (emphasis added). Inasmuch as the court below affirmed the district court's factual finding that the Bank did not accept the Cargo in this case (Pet. App. 11a), the decision below is perfectly consistent with *Dare*.[6]

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6 For the same reason, the decision below is also consistent with *Vane* v. *A.M. Wood & Co.*, 231 F. 353 (S.D.N.Y. 1916) and *Transmarine Corp.* v. *Delaware & Hudson Co.*, 127 Misc. 812, 216 N.Y.S. 623 (N.Y. Sup. Ct. 1926), decisions on which Torm mistakenly relies. Pet. 7, 8. Both of those decisions, like *Dare*, turned on the fact of "recei[pt of] goods under a bill of lading" by the consignee (*Vane*, 231 F. at 354) and "receipt and acceptance of the goods by the consignee under a bill of lading" (*Transmarine*, 127 Misc. at 813). There being no receipt or acceptance of the goods by the Bank in this case (Pet. App. 11(a) and 24(a)), the decision below is in harmony with *Vane* and *Transmarine*.

3. The Decision of the Court of Appeals Comports with the Practices and Economic Realities of the Marketplace and Poses No Threat to the Well-Being of Carriers Such as Torm

Torm's final contention for this Court to grant review of this case—that the Bank should bear the risk that Torm might not be paid by Beaumont because the Bank had "a greater opportunity to control the outcome of the transaction" (Pet. 20)—is ludicrous.

Torm contracted to provide its transportation services to, and to receive payment for those services from, Beaumont. The Bank was a stranger to their transaction. Under contract law and the general maritime law—which have not been changed in any respect by the decision below—Torm could have been paid its freight charges by, *inter alia*, enforcing its contractual rights against Beaumont or by enforcing its universally-recognized maritime lien against the Cargo it transported. Prudent carriers simply do not release a cargo until they have obtained either payment of, or adequate protection for, their freight charges. For reasons known only to Torm, Torm failed to pursue its rights against Beaumont and it failed to enforce its maritime lien when it delivered the Cargo to Beaumont prior to getting payment of its freight charges.

The inability of Torm to bring to this Court's attention relevant authorities analogous to the instant case, in which a carrier seeks to recover freight charges from a party who held a security interest in a transported cargo, demonstrates that the shipping market works well in this respect and that carriers are well protected. Carriers can obtain full or partial payment of their freight charges when a charter party is entered into, or carriers can obtain payment or adequate protection of their freight charges before abandoning their maritime liens in cargoes, or carriers can pursue parties contractually obligated to pay their freight charges. Torm elected not to take any of those options.

Torm's loss in this case is directly attributable to Torm's own conduct, and there is no appropriate basis to command the attention of this Court for the benefit of a single, imprudent carrier.

CONCLUSION

The petition for a writ of certiorari, having failed to meet any of this Court's criteria for exercising its discretion to grant certiorari, should be denied.

Respectfully submitted,

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